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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1659

WILLIAM P. PATRICK,
Petitioner,

vs.

FIELD RESEARCH CORPORATION,
MERVIN D. FIELD,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether an erroneous jury instruction by the trial court as to the degree of proof required of the element of "malice" in a defamation case is prejudicial as a matter of law without regard to the nature and extent of the evidence on that issue.

STATEMENT

Respondents have for many years been engaged in public opinion research. Their findings on issues of public interest in California are published in the news media under the name "The California Poll". The California Poll has always been financed by the news media. Prior to February 15, 1966, respondents conducted a public opinion survey to determine the preference of California voters with respect to the various candidates, including petitioner (hereafter sometimes "Patrick"), then engaged in the primary campaign for the gubernatorial nomination. On February 15, 1966, they released to the news media a California Poll report indicating that among Republican voters 1% favored Patrick's candidacy.

Patrick thereupon began a series of more than ten public statements (not including his allegations in his answer and amended answer herein that his statements were true), many of which were widely repeated in the news media, in which he repeatedly charged over a period of more than two months that respondents had accepted $16,000 from a candidate to "rig" The California Poll of February 15, 1966, that the poll was "dishonest" and "corrupt," that it "deliberately misrepresented" Patrick's standing with the voters, and that it was a part of a "conspiracy to mislead the public." Patrick also repeatedly stated that he welcomed a lawsuit by respondents, that he encouraged respondents to sue him, that if they did not sue him they admitted they were guilty, that he had proof that his charges were true, and that if taken to court he

was prepared to prove that his charges were true and was confident that he could do so. On two of these occasions he was specifically warned by reporters present that what he was saying was defamatory. He nevertheless continued to repeat his charges.

All of these statements were made in the presence of representatives of the news media and were widely republished by the media. The trial court instructed the jury that these statements were defamatory per se, and Patrick has taken no issue with that determination on appeal.

At the trial he made no effort to prove the truth of his statements, and he has taken no issue with the conclusion of the District Court of Appeal, based on evidence adduced by respondents (characterized by the court below as "overwhelming"), that the falsity of his statements "in their entirety" was established as a matter of law. All of this evidence is set forth in detail in respondents' brief to the Court of Appeal, pages 8-27.

Respondents conceded at the trial that they were public figures, and the trial court instructed the jury that respondents were required to prove "malice" in order to recover. The court's instructions to the jury defined the term "malice" in accordance with *New York Times v. Sullivan* (1964), 376 U.S. 254, as requiring respondents to prove that Patrick published his remarks knowing they were false or with reckless disregard for whether they were false or not, and specifically instructed the jury (based on *St. Amant v. Thompson* (1968), 390 U.S. 727):

> "There must be sufficient evidence to permit you, the jury, to conclude that the defendant in fact entertained serious doubts as to the truth of the statements which were published by him at the time they were published."

Petitioner takes no issue with any of the foregoing. Although he asserts that there are two questions presented by his petition, his sole claim appears to be that, since the trial court erred when it instructed the jury that malice, as correctly defined by the court, was required to be proved by a preponderance of the evidence rather than by "clear and convincing" evidence, such error requires reversal, no matter how conclusive the evidence that petitioner in fact entertained serious doubt as to the truth of the statements which were published by him at the time they were published. He thus contends that the Court of Appeal in turn erred when, after a careful review of the record, it found malice established as a matter of law, since, by petitioner's analysis, apparently no evidence could ever be sufficient to produce that result. Neither decision nor reason supports that contention. It has been advanced to the Court of Appeal and the Supreme Court of California without success. It is without merit.

ARGUMENT

Preliminarily, respondents respectfully disagree with the conclusion of the California Court of Appeal that there was any error in the trial court's instruction on burden of proof of malice. Respondents contend

that the "clear and convincing evidence" requirement relating to the issue of malice concerns the kind of facts required to be proved, rather than the requisite degree of proof, and that the trial court correctly instructed the jury on this issue. These contentions are set forth in full in Respondents' Brief to the Court of Appeal at pages 45 to 60. The trial court's instructions on this issue as well as all of its instructions defining malice are set forth in Appendix A to that Brief.

Proceeding on the premise, however, that the instruction on burden of proof of malice was in error, there is clearly no basis for granting a writ of certiorari here, because any such error was utterly harmless. In seeking a rehearing in the Court of Appeal and in subsequently seeking a hearing in the California Supreme Court, petitioner seemingly contended (as here) that the error was prejudicial as a matter of law, but he also asserted that the Court of Appeal had overlooked some of the evidence of his "good faith" belief in the truth of what he said, by reason of which the error in giving this instruction was prejudicial. Now, perhaps recognizing that there is no such evidence, his sole contention is that the error was prejudicial as a matter of law without regard to what the evidence was on this issue.

Petitioner asserts that the decision below is in conflict with decisions of this Court. There is no conflict; the cases upon which he relies do not support the contention he advances. Thus, in *Chapman v. California* (1966), 386 U.S. 18, it is expressly held that error

is harmless if there is no reasonable possibility that the error might have contributed to the verdict. Petitioner's reliance on *Time, Inc. v. Hill* (1967), 385 U.S. 374 (petn. p. 8) is also misplaced, since it indicates only that the question is for the jury where "either result finds reasonable support in the record." There is no such record here. In its more recent decision in *Brown v. U.S.* (1973), 93 S.Ct. 1565, 1570, this Court rejected the claim that constitutional error is always prejudicial and affirmed the judgment because of the "overwhelming" evidence which made the error harmless.

The Court of Appeal here clearly applied the standard of the *Chapman* case. It reviewed the evidence in detail and concluded that the uncontradicted evidence "established, at least, and as a matter of law," that petitioner published his statements with malice. Petitioner makes no effort to identify any evidence which the Court of Appeal overlooked or which indicates the slightest possibility that the error might have contributed to the verdict. He contents himself with the sweeping generalization that the error "did affect" his rights, as if this conclusion were established by mere assertion.

The evidence on this issue, construed most favorably to Patrick, is summarized in the opinion of the Court of Appeal; it is also summarized at pages 29 to 35 of Respondents' Brief to the District Court of Appeal. Upon that evidence there can be no reasonable possibility that the error affected the verdict. Patrick's own testimony shows beyond any possible doubt that

he not only spoke with reckless disregard for the truth but that he stated what he knew to be false, accompanied by declarations of intent to prove truth in court, an objective which he never intended to attempt, through witnesses he knew did not exist.

His sole purpose was to get his name in the news. As the California Supreme Court said on an earlier appeal in this case, "If the charges were true, it would certainly be news that the Field Poll had been 'bought'." *Field Research Corporation v. Superior Court* (1969), 71 C.2d 110 at 115. The testimony of his publicity advisor (Coultas: Resp. Br. pp. 33-34) as well as his attorney at the time (Belli: Resp. Br. p. 35) shows that he was interested only in attracting attention to himself with utter disregard for the truth of what he said.

Nor does petitioner's contention find support in any of the defamation cases which he cites. In *Monitor Patriot Co. v. Roy* (1971), 401 U.S. 265, plaintiff was a public figure campaigning for office. The action was against defendant newspaper and columnist for reporting that plaintiff had many years earlier been a "small-time bootlegger." The trial court instructed the jury that if this charged past misconduct was relevant to his fitness for public office, plaintiff was required to prove malice; if it was not relevant, malice was not required to be proved. The court left to the jury to decide whether the charge was relevant to his fitness for public office. The judgment for the plaintiff was reversed by this Court, which concluded that there was no evidence of malice; therefore, the jury

had apparently decided that the charge was not relevant to the plaintiff's fitness for public office. However, in the Court's view, past criminal misconduct is always relevant to fitness for public office, and therefore instructions allowing the jury to return a verdict for plaintiff without finding malice were prejudicially erroneous. Nothing in this decision supports petitioner's claim here.

Petitioner's contention is likewise unsupported by the decision in *Greenbelt Cooperative Publication Association, Inc. v. Bresler* (1970), 398 U.S. 6. In that case the court held that the trial court's instruction defining the term malice was in error (and also that the offending word "blackmail" was not defamatory under the circumstances presented). The trial court's instruction permitted a finding of constitutional malice from proof of hatred, spite or ill will, which in turn could be inferred from the language used in the allegedly defamatory articles. Since this was not a correct definition of the malice required in an action by a public figure under the standard established in *New York Times v. Sullivan* (1964), 376 U.S. 254, this instruction constituted error. The issue of degree of proof of malice was neither presented nor discussed.

In *Rosenbloom v. Metromedia, Inc.* (1971), 403 U.S. 29, the trial court's instructions to the jury did not require a finding of malice because plaintiff was neither a public figure nor a public official. This Court concluded that the failure to require a finding of malice was prejudicially erroneous, since the issue to

which the challenged statements related was a public issue. The Court further concluded, after an independent analysis of the record, that the evidence of malice in the record was not sufficient to present a jury question on that issue. The court reiterated the standard from the *St. Amant* decision that there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. In the case now before the Court the jury was expressly so instructed.

Nothing in any of these decisions supports petitioner's contention that, where the jury is correctly instructed as to the standard of malice, an erroneous instruction as to the required *degree* of proof of such malice dictates reversal as a matter of law without regard to the record. The evidence here cannot be read without immediately concluding beyond any possible doubt that petitioner made all of the defamatory statements with reckless disregard for their truth. It shows clearly and convincingly that he either knew they were false or entertained serious doubts as to whether they were true. His arrogant disregard for the truth was exemplified in his testimony at the end of the trial. At that point he had heard all of the evidence which he now concedes established the falsity of his statements as a matter of law, yet he once again declared under oath his "good faith" belief that his charges were true (Answer to Petition for Rehearing, pp. 6-7). Petitioner's only reference to the evidence in this case is his unsupported assertion that "the facts of this case bearing on petitioner's good

faith belief in the truth of his statements were not uncontradicted" (Petn. p. 8). Presumably this is the "contradiction" which petitioner has in mind.

CONCLUSION

The principle underlying *New York Times* and subsequent cases is that the First Amendment embodies a commitment to "robust debate" on public issues. Such a commitment affords no protection to a unilateral vendetta such as that carried on by Patrick here. The evidence shows that Patrick's long diatribe was conceived and carried out as a publicity campaign having nothing to do with robust debate. He showed himself beyond any possibility of doubt to be engaged in an assault on respondents solely for the purpose of keeping himself in the public eye. The whole fabric of his remarks was a vast hoax in which by conscious falsehood he sought to make himself appear a crusader for the public good. He repeatedly stated what he knew to be false and embellished these statements with declarations that he would prove them in court, an objective which he never intended even to attempt. The First Amendment affords no protection for such activity.

It has been recognized that there are cases in which the decision flows so inevitably from the facts that a consideration of claimed errors becomes virtually academic. 3 Witkin, *California Procedure* (2d ed.), 2280. Respondents believe this is such a case.

If the groundless declaration by petitioner of his belief in the truth of what has been demonstrated to be false could provide a basis for the reversal of such a case, then indeed the Fourteenth Amendment would have been discredited by "gossamer possibilities of prejudice." *Snyder v. Massachusetts* (1933), 291 U.S. 97, recently quoted at *Dutton v. Evans* (1970), 400 U.S. 71, 89-90.

The petition should be denied.

Dated, San Francisco, California,
July 5, 1973.

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Attorneys for Respondents.